77-1865

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-

BENJAMIN WARD, Commissioner,
New York State Department of
Correctional Services, and
ROBERT E. McCLAY, Superintendent,
Arthur Kill Correctional Facility,

Petitioners,

-v.-

WILLIAM BULGER,

Respondent.

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet.App. B)* affirming the district court's grant of the petition for writ of habeas corpus, is not yet officially reported.

The district court rendered an oral opinion, the transcript of which is C to petitioners' appendix. The district court's denial of petitioners' motion for reconsideration is included as D to petitioners' appendix.

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*Letters preceded by "Pet.App." refer to petitioners' appendix. Numerals preceded by "Pet." refer to pages of the petition for writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1978 (Pet.App. A).

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether any substantial issue exists for consideration by the Court when the Court of Appeals applied established principles of law to the facts of this case and correctly determined that the district court's grant of habeas corpus was appropriate.

STATEMENT OF THE CASE

In an indictment filed in New York Supreme Court, Richmond County, respondent William Bulger and a co-defendant, Thomas Sigman,* were charged with burglary in the third degree and petit larceny (N.Y. Penal Code §§140.20, 155.25). The charges arose from the September 24, 1974, theft of 10 cartons of cigarettes and a small amount of change from a grocery store on Staten Island, New York. The prosecution's chief witness, Carol Perine, testified three times -- at a preliminary hearing, before the grand jury, and at trial. At the preliminary hearing held three days after the incident, Perine stated that she was twice awakened in the early morning of September 24, 1974, by a "banging noise outside" (T.31, 52**). After the second time, Perine got out of bed, walked to a window, and observed two men either standing "by the street light" (T.31, 52) or "leaning against the do-not-walk sign" on the corner (T.35, 37-38). She

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*Co-defendant Sigman was not tried with respondent Bulger.

**Numerals in parentheses preceded by "T" refer to pages of the trial transcript; such numerals preceded by "P" refer to pages of the transcript of the preliminary hearing.

stated that "[t]he blond headed fellow [identified at trial as respondent Bulger (T.22)] never left the pole. He just stood there" (P.16; see also T.53).

Shortly after the preliminary hearing, Perine testified before the grand jury, at which time she reiterated that on the night in question she first saw respondent Bulger standing in the bus stop near the corner (T.29).

Perine's subsequent recollection differed from her testimony in the prior state proceedings. At trial, she stated that after she awoke the second time, she telephoned the police and told them that "there are two fellows standing across the street" (T.19, 29). One of the men -- the "dark haired fellow" -- then crawled through a hole in the glass door of the corner store. The other man -- "the blond headed fellow" -- was leaning against the store, near the door (T.20-21, 38, 40, 57). According to Perine, a short time later the co-defendant handed a brown paper bag to respondent Bulger through the door and then left the store, taking the bag from Mr. Bulger and putting it under a car parked nearby (T.22-23, 41-43, 54, 58-60). Perine testified that respondent Bulger then walked to the bus stop on the corner and was waiting there when the police arrived (T.23, 55, 60, 62). However, when confronted on cross-examination with her prior contradictory testimony elicited at the preliminary hearing and in the grand jury, Perine indicated that she had difficulty remembering the events and that her trial testimony might not be accurate.*

New York City police officer Robert Prather, who arrested respondent, testified that before the arrest respondent said that he was waiting for the bus which would take him to work (T.66-67). This testimony was corroborated by New York City police officer Allen Simon (T.88, 92), as well as by the prior

*Perine testified: "This is like a year ago, now. I, you know, each time I've been very nervous and I -- I really don't remember, really" (T.31). "... I can't think straight no more" (T.37). "I don't recall" (T.53-54) (repeated four times). "[T]his is a year ago, I really ... I don't even remember any more" (T.30).

testimony of Ms. Perine (T.24).*

Respondent Bulger did not testify, and his home address was neither proved nor part of the trial record.

On summation, the Assistant District Attorney argued that respondent's justification for being near the store -- that he was waiting for a bus to go to work -- should be rejected (Tr. of summation, dated October 24, 1975, at 35A). After this summation, which preceded a weekend recess, the trial judge cautioned the jurors not to read any newspaper account relating to the case (Id. at 40A).

Jury deliberations commenced the following Monday. The jurors were obviously troubled by the case and by Perine's testimony, indicating that they were unable to reach a verdict. However, after a modified Allen charge, the jurors found respondent guilty of burglary in the third degree.

After the verdict was rendered, respondent's trial counsel questioned several jurors as they left the courtroom. Based on these interviews, counsel moved for a hearing and a new trial on the ground that information dehors the record had improperly infected the jurors' deliberations. In support of the motion, defense counsel's affidavit stated:

> Juror Number 4, Mr. Moran, stated that he had been one of the jurors that had voted for acquittal up to the time the Judge sent the jury back for more deliberations. He told me that he changed his vote after one of the other jurors stated that he read in the newspaper over the weekend that the defendant, WILLIAM BULGER, did not live in Port Richmond, Staten Island, and that since he was not from the neighborhood, he may have been helping the co-defendant.
>
> (14a).**

To determine whether such information had been introduced before the jury, the trial judge questioned juror Moran under oath. Contradicting his previous statements to counsel, the

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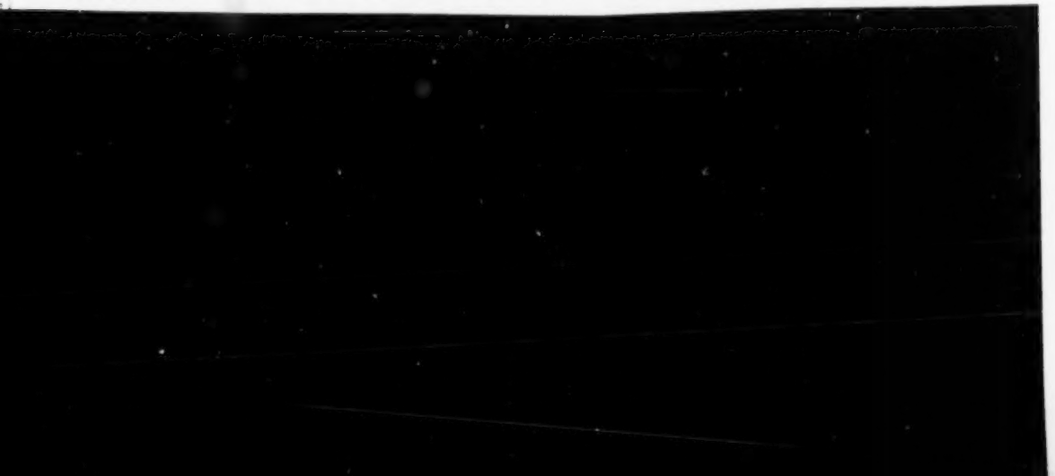
*Perine had heard one of the men standing in the bus stop tell the police that he was waiting for the bus (T.24).

**Numerals in parentheses followed by a lower case "a" refer to pages of the appendix to petitioners' brief, filed in the Court of Appeals.

juror indicated that respondent's home address was not mentioned during deliberations (18a). Defense counsel then desired to cross-examine Mr. Moran about the incident and about the juror's prior inconsistent statements in an attempt to show that Moran was lying at the hearing. However, over objection, counsel was precluded from asking any questions, and the trial judge denied the motion (19a-20a).

The judgment of conviction was affirmed by the Appellate Division, Second Department, 53 App.Div.2d 808, 384 N.Y.S.2d 712 (1976), and on June 28, 1976, leave to appeal to the New York Court of Appeals was denied. On May 31, 1977, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York,



renewing his claim, originally presented as part of his appeals in the state courts, that his conviction had been based on extrinsic information and consequently was in violation of his Sixth Amendment and due process rights. On September 16, 1977, a hearing was held on the question.

At the hearing in the district court, juror Francis Johnston, a unit manager of the Mobil Oil Corporation, testified that during deliberations one of the jurors mentioned respondent's home address and that "it became a subject of some heated discussion..." (26a, 30a). Mr. Johnston explained:

> ...[T]he discussion centered on the fact that what would the defendant be doing in an area, in the early hours of the morning, as I remember it was four o'clock or something, 4:00 a.m. in the morning, supposedly going to work? I think that was part of the excuse for being there on that corner when he, in fact, lived, he resided ten fifteen miles away from where the crime was committed.
>
> (27a).

Mr. Johnston was unsure whether the juror in question actually displayed a newspaper article containing respondent's home address or whether the information had been related verbally (26a, 32a, 36a).* Further, he stated that, after the jury's discharge,

*The record shows that a newspaper article appearing in a local paper on the Saturday preceding jury deliberations named respondent's home address (11a, 41a-42a).

he overheard defense counsel's interview with another juror who told counsel that the jurors had been aware of respondent's address (28a-29a, 33a-35a).

Counsel for the parties then entered a stipulation that there was no evidence presented at trial with respect to respondent's place of residence (37a).* Juror Moran, who had spoken to defense counsel after trial, was subpoenaed by the State; he failed to appear (41a).

As a result of the hearing, the United States District Judge found that the state court had failed to give respondent an adequate hearing in accord with due process requirements and that the usual procedure would be to issue the writ (51a). However, in deference to the State, the district court permitted the state court an additional opportunity to deal with the issue on the merits and to correct its error (55a). The district court ruled:

> ... [A] writ of habeas corpus will be granted and the defendant will be released unless within sixty days the state court holds a post-verdict hearing on the motion to set aside the verdict, on the grounds that extraneous information came to the attention of the jury.

(52a).

The state court declined to hold any further hearing and, on November 30, 1977, the district court rendered its opinion and granted the writ. The district judge reaffirmed his prior decision that, under applicable statutory provisions, the original state court proceedings were defective in at least three respects. Relying on 28 U.S.C. §2254(d)(2)(3)(6), the district court found that the state court fact-finding procedure was not adequate to afford a full and fair hearing, that the material facts were not adequately developed in the state court, and that respondent did not receive a full, fair, and adequate hearing (76a). Further, the court found "beyond a reasonable doubt" that the jurors learned of respondent's address during deliber-

*The Assistant District Attorney who tried the case also testified at the hearing.

ations (85a); that a newspaper article containing this information was published shortly before deliberations (76a, 85a), and that

> [t]he testimony of juror Johnston [a credible witness (74a)] at the September 16, 1977 hearing before this Court makes it clear that a discussion of the defendant's address not only took place, but was probably critical to the jury's ultimate finding of guilt.
>
> (84a).

In light of this testimony, the district court granted a writ of habeas corpus.*

On appeal, the Court of Appeals (Kaufman, Ch.J.) affirmed the grant of the writ of habeas corpus. Relying on the Court's decision in Stone v. Powell, 428 U.S. 465 (1976), and Frank v. Mangum, 237 U.S. 309 (1915), and its own decision in Suggs v. LaVallee, 570 F.2d 1092, 1112 (2d Cir. 1978), and Gates v. Henderson, 568 F.2d 830, 837 (2d Cir. 1977), the Second Circuit held that, in light of the facts of this case, "the state procedures were so defective as to warrant federal intervention." Appendix B at 9a. Further, that court found that the introduction of the extrinsic evidence of respondent's home address mandated the issuance of a writ of habeas corpus under the Court's decisions in Sheppard v. Maxwell, 384 U.S. 333 (1966), and Parker v. Gladden, 385 U.S. 363 (1966), and its own opinion in United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1972). The Court of Appeals grounded its holding on the unremarkable propositions that "the modern jury is instructed to reach its verdict solely on the basis of the evidence before it. See Irwin v. Dowd, 366 U.S. 717 (1961)" and that "all evidence developed against an accused must 'come from the witness stand in a public courtroom where

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*Subsequent to the district court's decision, the state trial judge filed a written decision reaffirming the denial of any hearing. Based on the transcript of the federal court proceedings, the state trial judge inexplicably rejected juror Johnston's testimony without viewing the witness or taking his testimony. Based on this decision, the State then moved for reconsideration of the district court's opinion. The district court denied the motion in a memorandum and order dated December 19, 1977 (Petitioners' Appendix D).

there is full judicial protection of the defendant's right of confrontation, of cross examination, and of counsel.' Turner v. Louisiana, 379 U.S. 466, 472-73 (1965)." Appendix B at 9a.

REASONS FOR DENYING THE STATE'S PETITION FOR WRIT OF CERTIORARI

The Court of Appeals' decision in this case correctly applied well-established constitutional and case law to the facts as found by the district court. The opinion of the Second Circuit creates no conflict with any known decision of the federal or state courts, and it presents no substantial issue for the Court's review. Under these circumstances, the petition for writ of certiorari should be denied.

I.

The issue here involved the jurors' consideration and discussion of information not introduced as evidence at trial. In findings of fact fully supported by the record and adopted by the Court of Appeals, the district court found that a newspaper article reporting the information -- respondent's address -- was published shortly before deliberations and that the jurors became aware of this extra-record proof during their discussion of the evidence. Indeed, the district court found that a discussion of this information "not only took place, but was probably critical to the jury's ultimate finding of guilt" (84a).

The Second Circuit's affirmance of the grant of the writ of habeas corpus was based on long-standing decisions of this Court and the courts of appeals, holding that a state court's violation of the rule that the jurors' "verdict must be based upon evidence developed at trial," Irwin v. Dowd, 366 U.S. 717, 722 (1961), may be remedied by a federal habeas corpus proceeding. Parker v. Gladden, 385 U.S. 363, 364 (1966); Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); Turner v. Louisiana, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional

concept of trial by jury"); United States ex rel. Owen v. McMann, 435 F.2d 813, 818 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1972) ("The touchstone of decision in a case such as we have here is ... the nature of what has been infiltrated and the probability of prejudice"); see Downey v. Peyton, 451 F.2d 236, 239-240 (4th Cir. 1971); United States v. Howard, 506 F.2d 865, 866-867 (5th Cir. 1975); United States v. McKinney, 429 F.2d 1019, 1023 (5th Cir. 1970).

Petitioners' argument that the decision in this case conflicts with the decision in United States v. Love, 535 F.2d 1152 (9th Cir.), cert. denied, 429 U.S. 847 (1976) (Petition at 7) is devoid of any merit. Indeed, in Love, the Ninth Circuit, quoting Judge Friendly's opinion in United States ex rel. Owen v. McMann, supra, expressly adopted the Second Circuit's enunciation of the standard to be applied to the kind of problem involved here:

> We agree with Judge Friendly that:
>
> 'The touchstone of a decision in a case such as we have here is ... the nature of what has been infiltrated and the probability of prejudice.'
>
> United States v. Love, supra, 535 F.2d at 1156; emphasis in the original.

The fact that in Love the Ninth Circuit found this test not to have been met simply does not constitute a conflict. Indeed, comparison of the facts in Love with the facts of this case highlights the error here, for in Love the district court found that the extra-record conversation between a juror and the defendant was totally unrelated to the trial and the incident involved was not harmful "to either of the appellants or prevented them from having a fair trial," United States v. Love, supra, 535 F.2d at 1156-1157.* In contrast, here the extrinsic proof

*Petitioners' contention that the Second Circuit's decision in United States v. Hockridge, slip op. 2133, 2138-2139 (March 27, 1978) is somehow inconsistent with this case (Petition at 6) is similarly without any merit. To the contrary, the trial judge in Hockridge made a full and complete inquiry into the problem and found that no prejudice had occurred.

Further, the State's argument that Wainwright v. Sykes, 433 U.S. 72, 87 (1977), is applicable here (Petition at 7) is frivo-

related to the central disputed issue in the case.

The State's alternative argument that the error was harmless (Petition at 5) presents no issue requiring review by the Court. Moreover, it was fully answered by the Second Circuit's opinion, the relevant part of which is quoted below:

> Nor is there any real question that Bulger was prejudiced by the jury's discussions of this extraneous evidence. The discovery by the jurors that Bulger lived a good many miles from the scene of the burglary certainly tended to discredit his excuse for being at the bus stop. Moreover, the jurors were obviously troubled by the case and by the inconsistencies and uncertainties in Ms. Perine's testimony, as was indicated by their difficulty in reaching a verdict. We have little doubt that the knowledge of Bulger's address may well have been determinative.[*]
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> Petitioners' Appendix B at 11a.

II.

The Court of Appeals' holding that the proceedings in the state court did not preclude respondent from seeking federal relief is clearly justified by the record. After a complete review of the proceedings, the district court held that respondent "had not been afforded the full and fair hearing required by 28 U.S.C. §2254," Petitioners' Appendix C at 16-17, specifically finding "that the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing ... that the material facts were not adequately developed at the state court hearing ... [and] that the applicant did not

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(Footnote continued from the preceding page)

lous. That case, which upheld the application of Florida's contemporaneous objection rule as a bar in a habeas corpus proceeding to a challenge to the admissibility of a confession, is simply inapposite. Here, respondent did not challenge the admissibility of the statement he made to police officers that he was waiting for the bus to go to work; rather, he timely objected to the jurors' consideration and discussion of information not introduced as evidence at trial, a circumstance discovered only after the verdict was rendered. Indeed, upon learning of these facts, trial counsel immediately moved for a new trial in a manner consistent with applicable state procedural rules..

*The Court of Appeals had previously stressed that "[b]y the conclusion of the trial, it was apparent that Bulger's justification for being in the area was an issue of some significance...." Petitioners' Appendix at 5a.

receive a full, fair, and adequate hearing in the state court proceeding." Petitioners' Appendix C at 17a. Petitioners' argument that the Second Circuit's discussion of the question was "totally conclusory" is belied by the record. The Court of Appeals explained:

> Justice Barlow's examination was, at best, cursory, particularly in light of the serious questions raised by the affidavit of Bulger's defense counsel. And the refusal of Justice Barlow to allow any cross-examination only exacerbated the inadequacy of his own examination. Moreover, Justice Barlow did not make any effort whatsoever to determine which of Moran's representations were credible by questioning other jurors.
>
> Petitioners' Appendix B at 8a.*

The issues in this case were correctly decided by the Court of Appeals on the basis of well-established constitutional principles.** The decision presents no substantial issue for review by this Court. Accordingly, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

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*These circumstances obviously distinguish the Court's decision in LaVallee v. DellaRose, 410 U.S. 690 (1973), upon which petitioners rely. Indeed, out of an overly solicitous concern for comity, the district court here upheld final decision in order to afford the state court yet another opportunity to hold its own hearing consistent with constitutional principles, a fact omitted in petitioners' petition for writ of certiorari. Despite this, the state court refused to hold any hearing whatsoever.

**Petitioners seem to assert that the Court of Appeals sanctioned an investigation into the mental process of the jurors (Petition at 6). This assertion completely misapprehends the decision in this case.